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September 20, 2018

Hon. John P. Asiello
Clerk of the Court
Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Matter of Bohlen v. DiNapoli*
A.D. No. 525823
Albany County Index No. 4153-17
OAG No. 17-224332

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NEW YORK STATE
COURT OF APPEALS

Dear Mr. Asiello:

Appellants submit this letter in response to your letter of September 10, 2018, inquiring whether the Third Department's memorandum and judgment finally determines the proceeding within the meaning of the Constitution. It does, as explained below.

At issue is a determination of the State Comptroller excluding certain compensation from petitioners' final average salaries for purposes of calculating their retirement benefits. After an administrative hearing, the Comptroller found that the compensation at issue was additional compensation paid in anticipation of retirement that, under Retirement and Social Security Law § 431(3), should not be included in petitioners' salary base for the purpose of calculating their retirement benefits. The Third Department, with two judges dissenting, disagreed. It concluded that the additional compensation at issue was "more appropriately characterized as payments genuinely made to delay petitioners' retirements," and that, accordingly, the Comptroller's determination was not

supported by substantial evidence. Memorandum and Judgment, p. 4. The Third Department granted the petition, annulled the Comptroller's determination, and remitted the matter to respondents for further proceedings not inconsistent with the court's decision. Memorandum and Judgment, p. 10.

The remittal does not render the Appellate Division's judgment nonfinal. The further proceedings on remittal would consist of the ministerial task of recalculating petitioners' retirement benefits with the inclusion of the previously excluded compensation. No action involving the exercise of discretion would take place. Consequently, the Third Department's judgment is final and subject to review by this Court. See *Matter of LaRocca v. New York City Department of Transportation*, 59 N.Y.2d 683, 685 fn (1983); *Matter of Bank of Manhattan Company v. Murphy*, 293 N.Y. 515, 520 (1944).

The ministerial nature of the remittal distinguishes this case from *Matter of Sica v. DiNapoli*, 141 A.D.3d 799 (3d Dep't), *appeal dismissed*, 28 N.Y.3d 1112 (2016), *lv. granted*, 29 N.Y.3d 908 (2017), *rev'd*, 30 N.Y.3d 674 (2018). In *Matter of Sica*, the Appellate Division, with two Justices dissenting, annulled a Comptroller determination denying a firefighter's application for accidental disability retirement benefits, concluding that the incident at issue was an accident within the meaning of Retirement and Social Security Law § 363. 141 A.D.3d at 801. That conclusion, however, did not end the inquiry of whether petitioner Sica was entitled to the accidental disability retirement benefits. The Appellate Division remitted the matter to the Comptroller for further proceedings on the issues of (1) whether petitioner was entitled to the heart-presumption under Retirement and Social Security Law §363-a and (2) whether the accident was the proximate cause of petitioner's permanent disability. The Comptroller took an appeal as of right, based on the two-Justice dissent. Because the remittal entailed further quasi-judicial or discretionary action by the Comptroller, this Court dismissed the Comptroller's appeal on nonfinality grounds, *see* 28 N.Y.3d 1112, but thereafter granted leave to appeal, *see* 29 N.Y.3d 908. Unlike in *Sica*, here the administrative proceedings on remittal would be ministerial in nature and would not require quasi-judicial or discretionary action.

Because the Appellate Division's judgment finally determines this proceeding, the Court should retain jurisdiction over this appeal.

Respectfully submitted,

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